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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRED S. BERRYMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the opinion en banc of the U.S. Court of Appeals for the First Circuit overturning the opinion of the original panel and sustaining the decision of the U.S. District Court for the District of Massachusetts denying petitioner's motion to suppress evidence conflicts with recent controlling rulings of the United States Supreme Court.

Whether the actions of the agents of the Drug Enforcement Administration at the airport constituted a seizure of petitioner under the Fourth Amendment.

Whether governmental interest in the detection of illicit traffic in narcotics justifies detaining an individual, confronting him with the suspicion of

criminal activity, searching his luggage and seizing and opening a sealed package therefrom, over the course of some forty-five to sixty minutes, based upon "drug courier profile" characteristics.

Whether the petitioner's alleged consent was freely and voluntarily given, and if so, whether it was given subsequent to a violation of his Fourth Amendment rights.

PARTIES

All parties are named in the caption.

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IN THE

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FRED S. BERRYMAN
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Fred S. Berryman, Petitioner, respectfully asks that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the First Circuit sitting en banc in United States of America, Plaintiff-Appellee v. Fred S. Berryman, Defendant-Appellant, No. 82-1194, October 11, 1983, which reversed the original panel's decision and affirmed the petitioner's conviction under 21 U.S.C. 841 (a)(1) for

possession of a controlled substance with intent to distribute by the United States District Court for the District of Massachusetts.

REPORTED DECISIONS

The opinion en banc of the United States Court of Appeals for the First Circuit is reported at 717 F.2d 650. The opinion of the original panel of the Court of Appeals is reported at 706 F.2d 1241. The opinion of the District Court is not reported. A copy of each of these opinions appears in the appendix to this petition.

JURISDICTION

1. On January 28, 1982, Petitioner was convicted of violating 21 U.S.C. §841 (a) (1) by the United States District Court for the District of Massachusetts. On appeal to the United States Court of Appeals for the First Circuit, the conviction of the Petitioner was originally reversed by a lengthy decision

filed on May 6, 1982. On June 20, 1983, Respondent sought and was granted a rehearing en banc before the United States Court of Appeals for the First Circuit. By a one paragraph decision, the United States Court of Appeals for the First Circuit sitting en banc reversed the original panel and affirmed the petitioner's conviction. As a precaution, the Petitioner sought a thirty day extension of time in which to file this petition on December 8, 1983. The Petitioner, however, was able to file this petition within the original time limits.

2. Jurisdiction lies to this court under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

STATEMENT OF THE CASE

On October 15, 1981, a federal grand jury sitting in the District of Massachusetts returned an indictment charging Fred S. Berryman (hereinafter the defendant) with knowingly and intentionally possessing with intent to distribute a quantity of cocaine in violation of Title 21 United States Code, Section 841 (a) (1) (1976). The defendant moved to suppress evidence and statements prior to trial, on the grounds that evidence had been obtained in violation of his Fourth Amendment rights. After a hearing on December 9, 1981, the defendant's Motion to Suppress was denied. The defendant received a jury

trial on January 28, 1982, and the jury returned a verdict of guilty. On appeal, a panel of the Court of Appeals for the First Circuit reversed the district court judgement in a lengthy opinion dated May 6, 1983. The government, however, sought and was granted a rehearing en banc. The brief opinion of the court sitting en banc, rendered on October 11, 1983, overturned the original panel and reinstated the defendant's conviction.

On September 8, 1981, the defendant arrived at Boston's Logan Airport at 8:30 p.m. on Delta Airlines flight 326 from Fort Lauderdale, which was some fifteen minutes late. Two Drug Enforcement Administration (DEA) agents observed Berryman, who was neither the first nor the last to leave the plane, walk quickly away from the gate area, and look over his shoulder once. The agents did not immediately follow Berryman, but watched as the rest of the passengers deplaned.

The agents later proceeded to the baggage area of Delta Airlines, where they observed Berryman standing five or ten feet from the baggage carousel, and occasionally looking around. The defendant's manner was suggestive of a person waiting for someone to pick him up. Berryman later told the agents that his wife was supposed to meet him. The defendant claimed one blue suitcase, and walked outside to wait for his wife.

The agents, based upon what they had observed, decided to approach Berryman. They stood on either side of the defendant, identified themselves as DEA agents, displayed their pocket commissions, and asked the defendant to answer a few questions. Berryman agreed, and told the agents truthfully where he had arrived from. Berryman produced his ticket and drivers license for the agents. Berryman's true name appeared on both the ticket and license, and he made

no attempt to conceal his true identity. The ticket was one-way and had been paid for in cash. The agents asked Berryman why and for how long he had been in Florida, and he answered that he had been there for three days seeking contracts for constuction work in Alaska. The defendant would later testify that he worked for a family business, Berryman Brothers Construction.

The defendant asked what the problem was, and the agents told the defendant that there was a lot of drug trafficking at the airport. The agents asked if they could look in Berryman's suitcase; stating that they believed it contained drugs. Agent Lemon testified that he told Berryman that Berryman could refuse permission. The defendant, however, testified that he asked if he had any choice, and the agents said, "not really."

The agents moved the defendant and his

bag a few feet away to a ledge where they placed the suitcase, and Berryman produced a key and unlocked his bag. It contained a giftwrapped package with a card. Berryman said he did not know what it contained, and that he was delivering it for someone he had met in Florida. Agent Lemon felt the package and opened the card. He then sought and obtained Berryman's permission to x-ray the package, and told the defendant he thought that it contained cocaine.

The defendant accompanied the agents back to the security area on the upper level of the airport. Agent Lemon x-rayed the package and informed the defendant that he thought it contained drugs, and he wanted to open it. The agents took the defendant to the Delta Airlines office back on the lower level of the terminal. Berryman remained outside the office with agent Fencer at his side, and Lemon entered the office to

open the package. Agent Lemon reappeared with two bags of cocaine. He gave Berryman Miranda warnings, but told the defendant he was not under arrest. The agents then took Berryman to the airport DEA office which was located on the third floor of the airport tower; several minutes walk away. At the office the agents called the United States Attorney, placed Berryman in a search position and patted him down, searched his wallet and emptied his pockets. Berryman was told he could leave, but that he might be arrested at another time.

The entire encounter lasted for forty-five minutes to one hour.

ARGUMENT AND REASONS FOR ALLOWING THE WRIT OF CERTIORARI

This case confronts the court with issues pertaining to the propriety of investigatory stops of citizens in airports and the detention and search of their baggage based upon the so-called

"drug courier profile" characteristics.

1. Whether the Court of Appeals failed to properly apply the precedential decisions of the United States Supreme Court related to airport stops, particularly including the recent decision of United States v. Place, and Florida v. Royer.

2. Whether the investigative detention of the Petitioner which was based on less than probable cause was reasonably limited in scope and duration.

3. Whether at some point during the investigative detention there was a seizure of the petitioner.

4. Whether there were sufficient articulable facts to give rise to a reasonable suspicion that the Petitioner was involved in criminal activity.

5. Whether any consensual acts or statements given by the Petitioner to the

DEA agents were given following his illegal detention, so as to render them invalid.

In United States v. Place, -- U.S. --, 103 S.Ct. 2637 (1983), this court held that an investigatory detention which was based on less than probable cause must be reasonably limited in scope, and that a 90 minute detention of a persons luggage was unreasonable in length. The length of the detention alone precluded the possibility that the detention was reasonable where there was a lack of probable cause. The Court also noted that the detention of luggage, while not always as intrusive as a detention of the person, was particularly intrusive where the luggage was seized from the immediate possession of the traveler because the

acts of the police intrude upon the persons possessory interest in his luggage, and his liberty interest in proceeding with his itinerary.

In Florida v. Royer, -- U.S. --, 103 S.Ct. 1319 (1983), this court concluded that at the time that the defendant had produced the key to his suitcase, after being confronted with a suspicion of carrying illegal drugs by narcotics agents, moved to a small room and asked to open his luggage, he had already been subjected to a more serious intrusion on his personal liberty than is allowable on a mere suspicion of criminal activity. -- U.S. --, --, 103 S.Ct. 1326.

The Petitioner's liberty interest and his possessory interest in his luggage and its contents were substantially interferred with by Drug Enforcement Administration (DEA) agents, who subjected the Petitioner and his luggage to a detention which lasted for

forty-five to sixty minutes and required the Petitioner to follow the agents throughout the terminal. The agents, with the petitioner in tow, subjected the contents of his luggage to an x-ray search back at the departure area on the upper level of the terminal, and finally opened the package in another part of the airport at the Delta Airlines baggage office. Finally, the petitioner was escorted by the agents to the DEA office which was several minutes walk away. All this was based upon such articulable facts which, when taken individually or together, are completely consistent with perfectly innocent behavior.

The Court of Appeals for the First Circuit in its opinion en banc, however, was absolutely silent on the issues raised by this court's decisions in Place and Royer, and overturned the original panel by simply reciting in one paragraph that the actions of the Petitioner were

voluntary, and therefore, there was no apparent violation of the constitution. It is submitted that the court's decision en banc is contrary to the law as set forth in Place and Royer, and for this reason alone the Petitioner's writ should be granted.

In Florida v. Royer, supra a majority of this court also endorsed a reasonable person standard for determining when a person is effectively seized under the Fourth Amendment. A person is seized when there is such a show of official authority that a reasonable person would believe that he is not free to leave. -- U.S. --, --, 103 S.Ct. 1326, quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1979) (Opinion of Stewart, J.). The court found that the defendant, Royer, had been seized where the officers identified themselves as narcotics agents, told the defendant he was suspected of

transporting narcotics, asked the defendant to walk to a police room, retained the defendant's ticket and license, and never indicated that the defendant was free to depart. Id.

The petitioner was faced with substantially similar circumstances in his airport encounter. He was initially confronted by two federal narcotics agents who stood on either side of him and displayed their pocket commissions. The petitioner identifed himself and answered all questions truthfully, but the agents prolonged the questioning. The agents then confronted the petitioner with a suspicion of transporting narcotics, and sought permission to open the petitioner's suitcase, stating they

believed that it contained drugs.[1] It is unrealistic to believe that any reasonable person would feel free to leave at this point. The facts are clearly very close to those in Royer, yet the opinion en banc of the Court of Appeals fails to address itself to the seizure issue.[2] The Court of Appeals

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1. The agents testified that they told Berryman he could refuse to open his suitcase. Berryman, however, testified that he asked if he had any choice, and the agents responded, "not really" or in some other words made it clear that the bag would be opened with or without his consent.
2. The trial judge in his ruling on the petitioner's motion to suppress, applied the reasonable person test in finding that Berryman was not seized. In doing so, however, he erroneously relied upon "the agents testimony that Mr. Berryman was told he was free to leave." As the original panel pointed out, there was no such testimony, and it was clearly an important factor in the trial judge's finding that the petitioner was not seized. On rehearing en banc, this clear and substantial error was not even addressed.

took the simplistic approach that there can be no violation of the constitution if a person voluntarily answers questions. The defendant's actions in Royer were also voluntary and cooperative, but this court still found that he had been seized during the encounter. Cooperation on the part of an individual with questioning police is not tantamount to consent to a search. This court should grant this petition for the reason that the decision of the Court of Appeals is contrary to the decision in Royer, and because there is no support for the unprecedented position that the Court of Appeals took on voluntariness.

This court has held that, under the Fourth Amendment, a detention of a person by the police must at least be supported by articulable facts leading to a reasonable suspicion that an individual is engaged in criminal activity. See, Reid v. Georgia, 448 U.S. 438, 100 S.Ct.

2752 (1980) and cases cited therein.

In Reid, this court concluded that no reasonable suspicion could exist as a matter of law based upon these facts: (1) petitioner arrived on a flight from a "source city," (2) petitioner arrived early in the morning when there is less law enforcement activity, (3) the petitioner and his companion were apparently concealing the fact that they were travelling together, and (4) they only had carry-on luggage. These factors were found to describe numerous innocent travellers. To allow detention based upon such a slim foundation would subject many innocent travellers to virtually random seizures.

The factors which the two DEA agents relied upon to stop the petitioner, like those in Reid, would also describe many innocent travellers. The petitioner arrived on a flight from a "source city," he walked rapidly, glanced over his

shoulder once, stood five to ten feet away from the baggage carousel, and glanced around while waiting for his one suitcase.[3] The petitioner's conduct up to this point is quite normal; especially in light of the fact that the plane arrived late, and the petitioner was looking for his wife, who was suppossed to meet him. On the basis of this behavior the two agents approached the petitioner, stood on either side of him, and identified themselves as DEA agents. The petitioner gave an honest answer when asked to identify himself,

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3. The agents did not follow the petitioner to the luggage area immediately, but watched as the rest of the passengers disembarked.

and produced a driver's license which matched the name on his ticket. The petitioner's ticket, however, was one-way and paid for in cash. The agents continued to question the petitioner about his business in Florida. The petioner stated that he was in Florida for three days discussing some building work in Alaska.[4] On these facts, which are not anymore substantial than those held inadequate in Reid, the agents confronted the petitioner with a suspicion of transporting narcotics, told the petitioner they suspected that his bag contained drugs, and asked that the petitioner open his bag.

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4. The petitioner was employed in a family business, Berryman Brothers Construction.

The similarity of the petitioner's case to Reid is striking, yet in reaching a different result than this court did in Reid, the Court of Appeals fails to even discuss the case or the issue. This being an additional reason that this court should grant this petition.

This court has held that the exception to the law of search and seizure based upon consent must consist of a consent which the Government has proved was a freely and voluntarily given consent, and not mere aquiescence to lawful authority. Schenecloth v. Bustamonte, 412 U.S. 218, 220, 228-229, 93 S.Ct. 2041 (1973), Bumper v. North Carolina, 391 U.S. 543, 548-549, 88 S.Ct. 1788 (1968).

In finding that the petitioner had consented to a search of his luggage, the trial judge stated that: "I accept the agent's testimony that Mr. Berryman was told that he was free to leave." (App. at 73). This was a critical error on the

part of the trial judge, as there in fact was no such testimony, and in fact the testimony of the agents during the suppression hearing contradicted this finding. United States v. Berryman, 706 F.2d 1241, 1245 (1983) (original panel). The trial judge placed great emphasis on this factor in finding that the petitioner had consented to a search: "There is an aspect to that that might need some enlargement, and that is if his consent would have been involuntary, if he were told he would not be free to leave -- under those circumstances, even if he gave consent, the Court would not consider it to be involuntary. But, again, that's not the situation here. I conclude and find he was told he was free to leave. He only felt that the was not." (App. 75-76).

The Court of Appeals on rehearing en banc does not address this clear error in the District Court's ruling on the Motion

to Suppress. A finding that a person was told he was free to leave is obviously a critical factor in analyzing whether or not consent was freely and voluntarily given. The petitioner in this case did no more than acquiesce to the agents authority, and in fact, it is the petitioner's position that he had already been seized by the time that he allegedly consented to the search of his suitcase. See, Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979).

The original panel in reversing the defendant's conviction examined and recited the facts in great detail. It found that the defendant was effectively seized prior to the time that the suitcase was opened. (Emphasis supplied). Neither the original panel nor the trial court considered the factual events following the seizure of the sealed package from the suitcase and the subsequent journey through the

airport in light of this court's holding in Place, supra. The Place decision was rendered following those opinions. The en banc opinion, which was also rendered after Place, is equally silent on those issues.

The defendant suggests that the physical seizure of the sealed package from the suitcase, and the prolonged possession and control thereof by the DEA agents, was an illegal seizure. The defendant, now dispossessed of his property, was not free to leave, and any consent he thereafter gave was invalid. Thus, the erroneous conclusions of fact and findings of law by the District Court and the Court of Appeals on the issue of consent, and the subsequent ruling of this court in Place, provide the final reasons for this court to grant this petition.

CONCLUSION

Wherefore, Petitioner Fred S. Berryman respectfully asks that a Writ of Certiorari issue to the United States Court of Appeals for the First Circuit to review the judgement in United States of America v. Fred S. Berryman, No. 82-1194, and that upon review by this Court that the denial of Petitioner's motion to suppress be reversed and the finding of guilty be reversed.

Respectfully submitted,
Fred S. Berryman, Petitioner.

by: /s/ Karnig Boyajian

Karnig Boyajian
Attorney

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1194

UNITED STATES OF AMERICA,
Appellee,

v.

FRED S. BERRYMAN,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon A. David Mazzone, U.S. District Judge)

Before
Campbell, Chief Judge,
Coffin, Bownes and Breyer, Circuit Judges.

Karnig Boyajian for appellant.
William F. Weld, U.S. Attorney, for appellee.

OPINION EN BANC

October 11, 1983

Per Curiam. After reviewing the record in this case and the panel's opinions, we conclude that the district court's judgment should be affirmed for the reasons set forth in the panel's dissent. This conclusion rests primarily upon our having found that Berryman's decisions to answer the DEA agents' questions and to allow them to look through his bag were voluntary. Berryman, of course, could have refused to speak with the agents. As the United States Attorney acknowledged at oral argument, such a refusal would not, and could not, have provided any legal justification for even brief involuntary detention. The exercise of one's constitutional rights is not the sort of "specific and articulable fact ( )," Terry v. Ohio, 392

U.S. 1, 21 (1968), that will itself, or in combination with other less-than-sufficient facts, justify a Terry-type investigative stop. Berryman, however, did not choose to stand on his rights. He voluntarily answered the agents' questions. Under these circumstances we see no violation of the Constitution.

The decision of the district court is

Affirmed.

BOWNES, Circuit Judge (dissenting). I respectfully dissent for the reasons set forth in the majority opinion of the original panel.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1194

UNITED STATES OF AMERICA,
Appellee,
v.
FRED S. BERRYMAN,
Defendant, Appellant.

JUDGMENT

Entered October 11, 1983

This cause came on to be heard on petition for rehearing en banc.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows:

The judgment of the District Court is affirmed.

By the Court:

/s/ Francis P. Scigliano

Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1194

UNITED STATES,
Appellee,
v.
FRED S. BERRYMAN,
Defendant, Appellant.

APPEAL FORM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. A. David Mazzone, U.S. District Judge)

Before
Swygert,* Senior Circuit Judge,
Bownes and Breyer, Circuit Judges.

Karnig Boyajian, for appellant.
John C. Doherty, Assistant U.S. Attorney, with whom
William F. Weld, U.S. Attorney, was on brief, for appellee.

May 6, 1983

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* Of the Seventh Circuit, sitting by designation.

SWYGERT, Senior Circuit Judge. On September 8, 1981, the defendant in this case, Fred S. Berryman, was accosted by two Drug Enforcement Administration ("DEA") agents after his arrival at Logan International Airport in Boston from Fort Lauderdale, Florida. In the course of this encounter two pounds of cocaine were discovered inside a package within the defendant's suitcase. He was subsequently indicted on a charge of knowingly possessing with intent to distribute a controlled substance in violation of 21 U.S.C. Section 841(a)(1)(1976). Before trial the defendant moved to suppress evidence and statements produced as a result of the encounter, arguing that they had been obtained in violation of the fourth amendment to the United States Constitution. After an evidentiary hearing the

district court denied the motion, and the defendant was convicted following a jury trial. This appeal, which challenges the denial of the motion to suppress, raises two issues: whether the encounter between the defendant and the DEA agents is governed by the fourth amendment's proscription of "unreasonable seizures" at all, and if so whether it was justified by reasonable suspicion. The district court did not reach the second issue because it found that no seizure had occurred. We reverse.

I

At the suppression hearing the two DEA agents and the defendant testified. The district court made some specific findings and generally credited the agents' testimony. Tr. 135, 137. The facts so

found are as follows.

The defendant arrived at Logan Airport on Delta Airlines flight 326, which was scheduled to arrive at 8:14 P.M., but in fact arrived at about 8:30. Tr. 3-6, 23-24. The flight originated in Fort Lauderdale, which is known to be a "source city" for the illegal distribution of narcotics. Tr. 4-5. The agents observed Berryman, who was among neither the first nor the last to leave the plane, walk quickly toward the terminal and glance over his shoulder once. Tr. 6, 23, 135. The agents next observed the defendant in the baggage claim area, where he stood five to ten feet from the baggage carousel, occasionally looked around, and picked up one bag. Tr. 7. His manner suggested he might have been

looking for someone who was to pick him up. Tr. 30. He later told the agents that his wife was to meet. Tr. 45. When he walked to the sidewalk outside the terminal, looking around once more, the agents approached him for questioning. Tr. 7. Their approach was motivated only by what they had observed, not by a tip. Tr. 11-12.

Standing on either side of Berryman but not touching him, the agents identified themselves as DEA agents and asked whether he would answer some questions. Tr. 8-9, 21. When he agreed, they asked where he had arrived from, and he answered truthfully. Tr. 9. They next asked to see his airline ticket and some identification, and Berryman complied. The ticket was one-way and had been paid for in cash; the

name on the ticket corresponded to that on the driver's license Berryman produced. Tr. 9. When asked why and how long he had been in Fort Lauderdale, Berryman said he had been there for three days on business concerning the purchase of land in Alaska. Tr. 9-10. The defendant asked what was the matter; the agents replied that the level of drug traffic between Fort Lauderdale and Boston was high. Tr. 10.

The agents then asked whether they could search Berryman's suitcase, and he consented. Agent Lemon testified that he informed the defendant that he could refuse to give them permission to search the suitcase. Tr. 11. The defendant's testimony was that at this point he inquired whether he had any choice in the matter and was informed, "not realy."

Tr. 103. The suitcase, which Berryman unlocked on the sidewalk, contained a giftwrapped package with a card, which Berryman said he was delivering for someone he had met in Florida and whose contents were unknown to him. Tr. 12-13. After feeling the package and opening the card with the defendant's permission, Lemon obtained permission to x-ray the package. Tr. 12-14. The defendant accompanied the agents to the security area. Tr. 15. Lemon testified that at this point Berryman was not free to leave. Tr. 48, 49. When the x-ray revealed no solid objects lemon told Berryman that he suspected the package contained cocaine, and obtained permission to open it. Tr. 16. Berryman accompanied the agents to a Delta Airlines baggage claim office;

he remained outside the office with Agent Fencer while Lemon entered the office and opened the package. Tr. 16-17. Fencer testified that he would have prevented Berryman from leaving at this point unless Lemon consented, because Lemon was in charge. Tr. 86-88. The package contained two bags of cocaine. Tr. 17-18. Lemon gave Berryman Miranda warnings but advised him that he was not then under arrest. Tr. 19. Berryman was taken to the DEA airport office, where the agents called the office of the United States Attorney, patted Berryman down, and checked his identification again. Tr. 20-21. Berryman left after being told that he might be arrested at a later time. Tr. 20-21.

II

A

In Terry v. Ohio, 392 U.S. 1, 19, 20,

25-27 (1968), the Supreme Court rejected both the notion that the fourth amendment does not regulate police-citizen encounters falling short of arrests, and the notion that it prohibits encounters based on less than probable cause for arrest. Instead, the Court held that, although some police-citizen encounters do not implicate fourth amendment concerns at all, id. at 19 n. 16, more intrusive encounters short of arrests must be justified by reasonable suspicion proportional to the degree of the intrusion, id. at 19, 20-22. That suspicion cannot be inchoate, but must be based on "specific and articulable facts . . . together with rational inferences from those facts" in order to establish a basis for review of the police actions. Id. at 21; see also Reid v. Georgia, 448 U.S. 438, 440 (1980)(per curiam), Brown

v. Texas, 443 U.S. 47, 51 (1979); United States v. Brignoni-Ponce, 442 U.S. 873, 878 (1975); Adams v. williams, 407 U.S. 143, 146-49 (1972).

We note initially that no articulable suspicion existed in this case at the time the DEA agents first accosted Berryman, making their investigation proper only if the encounter was not the type regulated by the fourth amendment. The facts that prompted the investigation--that Berryman had arrived from Fourt Lauderdale, that he walked quickly and looked over his shoulder once, and that he stood five or ten feet from the baggage carousel, looked around several times, and picked up one bag--are weaker than those the Court found insufficient in Reid v. Georgia, 448 U.S. at 441. In Reid the defendant had arrived from

Fort Lauderdale, had arrived early in the morning, had picked up no luggage, and had glanced repeatedly over his shoulder and otherwise appeared to try to conceal the fact that he was traveling with a companion. The Court assigned the first three circumstances no weight because they "describe(d) a very large category of presumable innocent travelers, who would be subject to virtually random seizures were the Court to conclude that (so) little . . . could justify a seizure." Id. It found that if the last circumstance was suspicious at all, the suspicion was too "'inchoate and unparticularized'" to justify the investigation. Id., quoting Terry v. Ohio, 392 U.S. at 27. The circumstances in the present case are, if possible, even less suspicious. As in Reid, most are completely innocent: arrival

from Fort Lauderdale, standing slightly away from the baggage carousel, and picking up one suitcase. Walking quickly and looking around (which the agents dubbed "scanning the area," although they admitted that the behavior they observed was like that of someone waiting for a ride) were equally innocuous, especially in light of the lateness of the flight. The sole remaining circumstance is that Berryman looked over his shoulder once on the way to the terminal. If this action is worthy of note at all, it is far slenderer a reed on which to base an investigation than the avoidance maneuvers the Court found insufficient in Reid. Nor do we find the combination of circumstances present here any more suspicious than the individual items.

The harder question is whether the encounter between the agents and Berryman raises any fourth amendment concerns. The district court, relying on this circuit's decision in United States v. West, 651 F.2d 71, 72-73 (1st Cir.), petition for cert. filed, 50 U.S.L.W. 3132 (U.S. Sept. 8, 1981)(No. 81-307), which endorsed the test for fourth amendment seizures proposed in one of the several opinions of the fragmented Court in United States v. Mendenhall, 446 U.S. 544, 554 (1980)(opinion of Stewart, J.)(a seizure occurs in circumstances in which a reasonable person would not feel free to leave), held that there was no seizure. It reasoned that

> (the agents were) in plain clothes. Their weapons were concealed, although there may have been some inadvertent display. They were not displayed openly. There was

> no physical restraint. I accept the agents' testimony. The area was public.
>
> I conclude that, on these facts, a reasonable person would not have believed that he was not free to leave or decline to answer any question.

Tr. 137-38.

The facts on which the court based its conclusion that no seizure had occurred are reviewable for clear error. See Fed. R. Civ. P. 52(a). One of the findings on which the court placed heavy reliance, that the agents told Berryman he was free to leave, see id.; tr. 139 ("I conclude that and find he was told he was free to leave."), is clearly erroneous. No testimony supports this finding, and in fact it was contradicted by the agents during the suppression hearing. See tr. 40 (Berryman was not told he was free to go at the beginning of the

encounter); tr. 45 (Berryman was not told he was free to go when permission to search was requested).

The emphasis the trial judge placed on this mistaken factor suggests that he viewed the remaining facts as insufficient by themselves to establish that an atmosphere existed in which a reasonable person would feel free to leave. This impression is bolstered by the fact that the absence of such a warning is sometimes noted as significant in characterizing police-citizen encounters. See Florida v. Royer, 51 U.S.L.W. 4293, 4296 (U.S. March 23, 1983) (No. 80-2146) (plurality opinion) (failure to tell defendant he was free to go contributed to characterization of encounter as an arrest); Dunaway v. New York, 442 U.S. 200, 212 (1979) (same); United States v. Patino, 649 F. 2d, 727 (9th Cir. 1981) (failure to inform defendant she was

free to leave or to refuse to answer contributed to characterization of encounter as seizure); United States v. Hill, 626 F.2d 429, 435-36 (5th Cir. 1980)(arrest). See also A Model Code of Pre-Arraignment Procedure Sections 110.1(2), 110.2(5) & Commentary 260-61, 285-88 (1975)(requiring warnings). The impression is also borne out by the testimony at the hearing. Agent Lemon testified that when he approached Berryman,

> I came to Mr. Berryman's left, and Agent Fencer came to his right. In other words, we were standing beside him. We went in front of him and we went in back of him.

Tr. 8. The number and position of officers have been recognized as important considerations for determining whether an atmosphere of restraint can be said to have existed. See United States v.

Mendenhall, 446 U.S. at 554 (opinion of Steward, J.); United States v. Berry, 670 F.2d 583, 597 (11th Cir. 1982) (en banc) ("blocking an individual's path or otherwise intercepting him to prevent his progress in any way is a consideration of great, and probably decisive, significance"); United States v. Morin, 665 F.2d 765, 769 (5th Cir. 1982); United States v. West, 651 F.2d at 73; United States v. Patino, 649 F.2d at 727.

The fact that Berryman exhibited no apprehension when he was approached by the DEA agents does not weaken our conclusion. This is true for three reasons: first, because the test is an objective one, concerned with whether a reasonable person would feel he could leave, it does not matter whether a particular defendant feels

intimidated or at ease. See United States v. Viegas, 639 F.2d 43, 44 (1st Cir.), cert. denied, 451 U.S. 970 (1981). Second, to hold otherwise would place defendants in the curel dilemma of either appearing to feel free to go so that the stop does not implicate the fourth amendment, or appearing apprehensive so that the stop is justified by reasonable suspicion, thus validating the stop in either case. Finally, the correlation between lack of restraint and lack of anxiety seems to us to be weak. Cooperativeness could indicate submission or indifference as easily as it indicates lack of restraint. Cf. Bumper v. North Carolina, 391 U.S. 543, 548-49) (1968) (acquiescence not probative of consent). The fact that Berryman

acquiesced in the questioning is unimportant for the same reasons.

Moreover, even if the initial encounter in this case were not the kind of stop regulated by the fourth amendment, it is clear that Berryman was "seized" at some point during the encounter. Agent Lemon testified that after discovery of the package Berryman was not fee to leave, a judgment to which Agent Fencer deferred, and, although his subjective intent to restrain the defendant is not determinative, see United States v. Mendenhall, 446 U.S. at 554 n.6 (opinion of Stewart, J.), the inference that he conveyed that intent in his tone of voice and manner when he asked Berryman to accompany him to the x-ray machine is powerful. See United States v. Berry, 670 F.2d at 598; cf. Florida v.

Royer, 51 U.S.L.W. at 4296 & n.8 (plurality opinion). By that point, therefore, Berryman had been "seized" for fourth amendment purposes, and he may have been restrained even earlier. If at the moment he first felt restrained there was no reasonable suspicion or valid consent, the seizure violated the fourth amendment.

We think that the prolongation of the questioning in this case created an atmosphere of restraint prior to the time the suitcase was opened, even if Berryman's freedom to leave was not curtailed by the agents' initial approach. A reasonable person would not feel free to walk away when, after answering truthfully where he had been and for how long, and proffering his airline ticket whose information is confirmed by other identification, he is

questioned further and confronted with the suspicion of drug trafficking. See Florida v. Royer, 51 U.S.L.W. at 4295 ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop") (plurality opinion); id. at 4296 ("Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such

that 'a reasonable person would have believed he was not free to leave.'") (quoting United States v. Mendenhall, 446 U.S. at 554 (Opinion of Steward, J.)); Terry v. Ohio, 392 U.S. at 18 ("a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope"); id. at 28-29 ("The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation."); United States v. Gooding, 695 F.2d 78, 82 (4th Cir. 1982) (prolongation of questioning when preliminary questions fail to raise any suspicion contributes to finding that defendant was detained); United States v. Bautista, 684 F.2d 1286, 1290 (9th Cir. 1982) (prolonged questioning must be justified); United States v. Berry, 670 F.2d

at 597 ("Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention.") (footnote omitted); see also United States v. Jodoin, 672 F.2d 232, 235 (1st Cir. 1982) (when answers to initial questions produce additional suspicion they justify further questioning). Berryman's answers to the initial questions in the present case did not create suspicion when none existed before. He answered the questions truthfully. The name on his ticket matched the name he gave the agents and the one on his driver's license. He did not appear nervous. The only possible source of suspicion[1] was that his ticket was one-way and had been paid for in cash,

a typical element of "drug Courier Profiles." But one drug courier characteristic standing alone does not create a reasonable basis for a fourth amendment seizure. See Reid v. Georgia, 448 U.S. at 441; United States v. Gooding, 695 F.2d at 83; United States v. Berry, 670 F.2d at 600-01; United States v. Rico, 594 F.2d 320, 326 (2d Cir. 1979); United States v. Smith, 574 F.2d 882, 884 (6th Cir. 1978). This is true for a simple reason: the profile is simply a collage of otherwise innocent characteristics designed to guide the focus of the agents' observations, and only when the characteristics

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[1]We disagree with the dissent's assumption that Berryman's statement that he was in Florida to conduct negotiations concerning Alaskan land is suspicious; the state of Florida is not devoid of land speculators, with whom Berryman might plausibly have been dealing.

are combined in a suspicious manner, or lead the agents to observe independently suspicious conduct, is official intrusion warranted. See United States v. Berry, 670 F.2d at 600-01; see also Florida v. Royer, 51 U.S.L.W. at 4296 (plurality opinion) (reasonable suspicion existed only because of the combination of use of an assumed name, paying cash for one-way ticket, checking bags with incomplete identification tags, and nervous conduct). We conclude that when the agents continued to question Berryman they lacked a reasonable basis to detain him and violated his fourth amendment right to be free from such interference. If Berryman subsequently consented to the search of his suitcase and its contents, that consent did not

expunge the earlier illegality.[2]

B

In our discussion thus far we have assumed that a "seizure" is an independently ascertainable fact. The Supreme Court's treatment of this issue, however, indicates that the existence of reasonable suspicion and the existence of a fourth amendment stop are not unrelated questions. Terry v. Ohio, 392 U.S. at

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[2]Although we need not reach the issue of whether Berryman consented to this search because of our conclusion that the illegality occurred earlier, we note that in denying the motion to suppress the district judge did not mention Agent Lemon's testimony that Berryman had been advised that he could refuse to open his suitcase. Because this testimony was inferentially contradicted by the defendant, we could not, were we to decide the consent issue, include it as a fact to be given any weight absent a finding by the district court.

17 (footnote omitted), rejected precise categorization of types of enounters:

> The danger in the logic which preceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person is two-fold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.

Instead, Terry held that "(t)he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," id. at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967)(Fortas, J., concurring)), and emphasized that "the central inquiry under the Fourth Amendment (is) the reasonableness in all the

circumstances of the particular governmental invasion of a citizen's personal security. 'Search' and 'seizure' are not talismans." Id. One question a court must ask is "whether the officer's action . . . was reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 20.

Although Terry was concerned with searches, the Supreme Court has employed the same analysis of stops of persons. See, e.g., United States v. Cortez, 449 U.S. 411, 421 (1981); Brown v. Texas, 443 U.S. at 52; Delaware v. Prouse, 440 U.S. at 653-54; United States v. Brignoni-Ponce, 422 U.S. at 884; Adams v. Williams, 407 U.S. at 145-46. These cases hold that the degree of intrusiveness of stops

that do not rise to the level of arrests may vary, and in order to be lawful in a given case it must be proportional to the degree of suspicion that prompted the intrusion. When little or no suspicion exists, therefore, very little intrusion is tolerable. Brown v. Texas, 443 U.S. at 52, strongly states this principle of proportionality:

> In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. . . . (E)ven assuming that (a strong social) purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

See also Florida v. Royer, 51 U.S.L.W. at

4295 ("The scope of the detention must be carefully tailored to its underlying justification.") (plurality opinion); Delaware v. Prouse, 440 U.S. at 654 ("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourt Amendment interests against its promotion of legitimate governmental interest"); United States v. Bautista, 684 F.2d at 1290 (prolonged questions must be "related in scope to the justification for their initiation") (quoting United States v. Brignoni-Ponce, 422 U.S. at 881, quoting Terry v. Ohio, 392 U.S. at 29); United States v. Ramirez-Cifuentes, 682 F.2d 337, 343 (2d Cir. 1982) (court must "carefully measure( ) the need for the stop against the nature of the intrusion suffered"); United States v. Nembhard, 676 F.2d 193, 202 (6th Cir. 1982)

(reasonableness of a stop is dependent on balance of public interest and private right to be free from arbitrary interference); United States v. Streifel, 665 F.2d 414, 422 (2d Cir. 1981) ("(A)n officer having a reasonable suspicion, based on articulable, objective facts, that criminal activity is afoot may make an investigatory stop that is reasonable both in its duration and its intrusiveness. . . . In balancing the government's law enforcement interests, it is generally true that the more intrusive the stop, the stronger the justification must be . . . and that 'if probable cause is lacking, the intrusion must be no greater than the circumstances require'") (quoting United States v. Vasquez, 638 F.2d 507, 520 (2d Cir. 1980), cert. denied, 450 U.S.

970 (1981), 454 U.S. 847 (1981)); United States v. Viegas, 639 F.2d at 45 ("The facts before the agents . . . adequately justified the initial inquiry. . . . The slight intrusion of this encounter was supported by the (defendants') evasive actions in the airport. . . ."); United States v. Dodier, 630 F.2d 232, 234-35 (4th Cir. 1980) ("The minimal intrusion on privacy rights by an investigative stop is permissible if 'the police officer (can) point to specific and articulable facts which . . . reasonably warrant that intrusion'") (quoting Terry v. Ohio, 392 U.S. at 21).

Whether an investigatory stop of limited intrusiveness is controlled by the fourth amendment therefore depends on the justification for even that limited

intrusion. This rule is rooted in the Court's interpretation of the fourth amendment as embodying the dual concerns of protecting privacy interests and avoiding arbitrary official action. See Michigan v. Summers, 452 U.S. 692, 701 & n.14 (1981), Reid v. Georgia, 448 U.S. at 441; Brown v. Texas, 443 U.S. at 51 (fourth amendment "assure(s) that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field"); Delaware v. Prouse, 440 U.S. at 654, 661, 662-63; United States v. Brignoni-Ponce, 422 U.S. at 882; Terry v. Ohio, 392 U.S. at 14 & n.11, 15, 21-22. If the threshold forth amendment inquiry were limited to consideration of the physical circumstances of the stop, apart

from the justification for the officers' approach, the officers' discretion to make arbitrary or discriminatory stops would be unfettered. See A Model Code of Pre-Arraignment Procedure Section 110.2(1)(a) & Commentary 262-63, 269-70, 273, 276-77 (1975).

It is important to remember that Terry stops are valid only because of an exception to the usual rule requiring "advance judicial approval of searches and seizures through the warrant procedure." Id. at 20; see also Florida v. Royer, 51 U.S.L.W. at 4295 (plurality opinion). The exceptions to this general rule are motivated by necessity but are limited by the requirement that judicial approval be available after the fact if it is impossible in advance:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Terry v. Ohio, 392 U.S. at 21 (footnote omitted). Because reviewability is central to the scheme of this exception to the warrant requirement, declining to examine the justification for police conduct would be to abdicate a responsibility and to invite arbitrariness.

It is true that the Supreme Court has noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons." Reid v. Georgia, 448 U.S. at 440 n.*; Terry v. Ohio, 392 U.S. at 19 n.16; see also Florida v. Royer,

51 U.S.L.W. at 4295 (plurality opinion). Asking a passerby for directions, see United States v. Viegas, 639 F.2d at 44, or questioning possible witnesses of a crime, see A Model Code of Pre-Arraignment Procedure Section 110.2(1)(b) (1975), for example, may invoke no fourth amendment concerns. The reason for these exceptions, however, is not that "the law does not concern itself with trifles"; it is because these situations, unlike inherently confrontational ones, do not pose any risk of arbitrary or abusive exercise of discretion. But whenever an officer identifies himself as a drug enforcement agent and singles out an individual for questioning, the implication of suspicion and the potential for abuse are clear.

This is not to say that all intrusions, no matter how minimal, in which the risk of arbitrariness is present must be justified by a uniform degree of suspicion. Such a rule was rejected in Terry, v. Ohio, 392 U.S. at 16-19. Rather, the test is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Id. at 19. Less suspicion is required to initiate a minor intrusion, therefore, than to justify a more severe restriction on liberty.

In assessing reasonableness the court must weigh the importance of the governmental and individual interests. See Michigan v. Summers, 452 U.S. at 702. It is not enough to say that, in a case like the present one, the limited nature of the intrusion makes the individual interest

inconsequential when compared with the government's overwhelming interest in controlling drug trafficking. If the government's general interest were at issue, it would outweigh almost any individual interest and stretch fourth amendment protections wafer thin. That kind of balancing, however, is improper because the court's duty is to "evaluate the reasonableness of a particular . . . seizure in light of the particular circumstances." Terry v. Ohio, 392 U.S. at 21 (emphasis added); see A Model Code of Pre-Arraignment Procedure, Commentary 276-77 (1975). When an officer cannot articulate suspicions concerning a particular individual, the government's interest in controlling drug trafficking by that individual is small. Brown v. Texas,

443 U.S. at 52. In fact, the government then has an interest in avoiding arbitrariness.

In the present case the intrusion was limited, but the DEA agents were unable to articulate any reason to justify any degree of intrusion. This situation is therefore distinguishable from other cases in which this court has held minimal intrusions not to be violative of the fourth amendment when such interference was reasonable in light of the officers' articulated suspicions. See, e.g., United States v. Regan, 687 F.2d 531, 536 (1st Cir. 1982); United States v. Jodoin, 672 F.2d at 234-35; United States v. Viegas, 639 F.2d at 45; United States v. Rodriguez Perez, 625 F.2d 1021, 1026 (1st Cir. 1980). It is also distinguishable from United States v. West,

651 F.2d at 72-74, in which this court found it unnecessary to consider the reasonableness of the officers' suspicions, because the defendant in that case actually left, demonstrating that his liberty was not even minimally intruded upon.

We conclude that Berryman's fourth amendment right to be free from arbitrary interference was violated, and that the evidence obtained as a result of this illegality should have been suppressed. See Terry v. Ohio, 392 U.S. at 29; Wong Sun v. United States, 371 U.S. 471, 484-88 (1963); United States v. Gooding, 695 F.2d at 84. We therefore reverse the judgment of the district court.

REVERSED.

BREYER, Circuit Judge (dissenting). I dissent because I believe that the panel's result is unsound as a matter of Fourth Amendment policy and contrary to controlling precedent.

We agree about the facts. Two DEA agents initially became suspicious of Berryman because he fit their "drug courier profile." He arrived at Logan Airport from a "source" city, he looked nervous, he walked rapidly form the plane to the luggage area, he scanned the baggage claim area, and he had only a little luggage. On the basis of these few facts (and whatever insight their experience and intuition may have added) the DEA agents, in the words of the defendant, "approached me, . . . identified themselves as DEA agents, . . . explained to me they were

drug enforcement people . . . . (and) asked if they could speak to me." Berryman agreed.

The agents' initial questioning revealed that Berryman had been in Florida three days and returned on a one-way ticket for which he had paid cash -- facts that brought him more squarely within the "drug courier profile." Berryman also said that he did not buy round-trip tickets for short business trips because he like to buy one-way tickets. He added that he had gone to Florida to discuss a land deal in Alaska. And, he agreed to let the officers look through his luggage (a consent which the district judge held was "freely and voluntarily given").

In looking through the suitcase one agent moved a gift wrapped package, which

Berryman said someone had entrusted to him and probably contained a toy. The agent testified:

> I was told there was possible a toy in there. There was nothing solid in there I could feel. A very powdery, chunky substance.

He also described it as having "a soft mushy-type feeling with chunks." One of the agents said that at this point he subjectively believed that he would not allow Berryman to leave. Berryman then went with the agents to the security area where they x-rayed the package. And, he waited outside the baggage claim office while one of the agents opened the package and found cocaine.

I have been unable to find any controlling precedent that has found a Fourth Amendment violation on facts like these. And, I have found numerous

cases that expressly or impliedly hold the contrary. See, e.g., Florida v. Royer, 51 U.S.L.W. 4293 (U.S. March 23, 1983); Reid v. Georgia, 448 U.S. 438 (1980)(per curiam); United States v. Mendenhall, 446 U.S. 544 (1980); United States v. Regan, 687 F.2d 531 (1st Cir. 1982); United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982); United States v. West, 651 F.2d 71 (1st Cir. 1981), petition for cert. filed, 50 U.S.L.W. 3132 (U.S. Sept. 8, 1981); United States v. Viegas, 639 F.2d 42 (1st Cir.), cert. denied, 451 U.S. 970 (1981). But let me be more specific.

1. First, consider the agents' initial approach and questioning. Part II-B of the panel's opinion suggests that the agents could not constitutionally approach Berryman as they did and ask him if he would answer some questions. This suggestion is

contrary to the statement of Justice White, and seven other Supreme Court Justices, in Florida v. Royer, supra. In Royer, the Court held that:

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

51 U.S.L.W. at 4294-95; accord Reid v. Georgia, 448 U.S. at 440 n.*; United States v. Mendenhall, 446 U.S. at 552 (opinion of Stewart, J.); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); United States v. Regan, 687 F.2d at 535; United States v. Jodoin, 672 F.2d at 234; United States v. West, 651 F.2d at 72-73.

For the most part, the courts have

reasoned that if officers ask for and receive permission to question a person there is no "seizure" within the terms of the Fourth Amendment. In determining whether a person has been seized, this circuit has explicitly followed the rule that Justice Stewart articulated in United States v. Mendenhall, 446 U.S. at 554 (plurality opinion):

> a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

See United States v. West, 651 F2d at 72; United States v. Viegas, 639 F.2d at 44. This rule, as applied to this case, means that there was "no seizure" before the agents found the package, and quite possible even thereafter.

But, even if we were to consider an agent's voluntary questioning a Fourth Amendment "seizure" -- as Judge Swygert does here and in his dissents in United States v. Black, 675 F.2d 129, 139 (7th Cir. 1982), cert. denied, 51 U.S.L.W. 3716 (Apr. 4, 1983); and Moya v. United States, ___ F.2d ___, No. 81-2225 (7th Cir. March 22, 1983) -- the Fourth Amendment would still not forbid it. The Fourth Amendment forbids unreasonable seizures. "Reasonableness" is a matter of interest balancing. Here, the police interest in voluntary questioning is great. To hold that the police cannot even ask voluntary questions of those who strike them as knowledgeable or suspicious would severely interfere with their ability to detect or investigate burglaries, murders, drug

traffic and other crimes. United States v. Mendenhall, 446 U.S. at 561 (Powell, J., concurring) ("The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit."); United States v. Berry, 670 F.2d 583, 595 (5th Cir. 1982) (en banc) ("Informing our police that they cannot approach citizens to enlist their voluntary support in ending this (drug) trade may be tantamount to preventing its interdiction at all."); Wilson & Kelling, Broken Windows, Atlantic, March 1982, at 29 (importance of police-citizen contact for "order-maintenance" and the preservation of communities). At the same time, the privacy interest at issue is minimal. While many of those questioned may feel "pressure" to cooperate, most will not

mind helping the police investigate. Those who do mind can always answer the query "May I ask you some questions?" with the word "no." In other words, to force the police to give up the practice of polite, voluntary questioning would threaten serious harm to the public interest in safety and effective law enforcement; to impose the duty upon an unwilling citizen to answer "no" would burden privacy interests only slightly. Thus, it does not surprise me that so many courts have rejected the per se condemnation of voluntary airport questioning implicitly advanced by Judge Swygert here and in his dissents to United States v. Black, 675 F.2d at 139 ("Police encounters that involve investigative questioning that focuses on the person being stopped are inherently

coercive.") (Swygert, J., dissenting), and United States v. Moya, supra ("Whether an investigatory stop of limited intrusiveness is controlled by the Fourth Amendment therefore depends on the justification for even that limited intrusion.") (Swygert, J., dissenting). See, e.g., United States v. Moya, supra (no seizure where police agent approaches an individual, identifies himself as an agent, and asks questions which the individual need not answer); United States v. Collis, No. 82-1127 (6th Cir. Feb. 16, 1983) (same); United States v. Tolbert, 692 F.2d 1041 (6th Cir. 1982) (same); United States v. Moore, 675 F.2d 802 (6th Cir. 1982) (same); cert. denied, 51 U.S.L.W. 3716 (1983); United States v. Berry, 670 F.2d 583 (5th Cir. 1983) (en banc) (same); United States v. Sanford,

658 F.2d 342 (5th Cir. 1981)(same), cert. denied, 455 U.S. 991 (1982); United States v. Setzer, 654 F.2d 354 (5th Cir. 1981)(same), cert. denied, 103 S. Ct. 457 (1982); United States v. Smith, 649 F.2d 305 (5th Cir. 1981)(per curiam) (same), cert. denied, 454 U.S. 1097 (1981); United States v. Herbst, 641 F.2d 1161 (5th Cir.)(same), cert. denied, 454 U.S. 851 (1981); United States v. Berd, 634 F.2d 979 (5th Cir. 1981)(same); United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980)(same); United States v. Fry, 622 F.2d 1218 (5th Cir. 1980)(per curiam) (same); United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979)(same), cert. denied, 447 U.S. 910 (1980).

The panel seeks to escape these cases and principles in two ways, neither of which seems satisfactory. First, it may

believe that the agents erred in not specifically telling Berryman that he did not have to answer their questions. That is to say, the panel may allow voluntary questioning if, but only if, the police not only ask permission to question an individual but also add the words "you need not answer." Whatever the merits of this approach, no other court has adopted it. The Supreme Court in Royer upheld the initial questioning without any such warning, and this circuit similarly upheld airport questioning in Jodoin, Regan, and West, without mentioning a warning. Thus, for us to impose another "Miranda warning" type of requirement on police questioning seems unwise, at least without first hearing argument about its implications.

Second, the majority may believe there is something special about the initial questioning in this case that distinguishes it from the precedent I have cited. If so, I fail to find it. In United States v. Regan, 687 F.2d at 535, for example, this court permitted voluntary questioning under circumstances described as follows:

> The district court found that the two agents, dressed in business suits, approached defendant as he was walking towards the exit; that they displayed no weapons; that they did not order him to stop or the like; that he said "sure" when asked if he would speak with them; and that while an agent assumed a position on either side of him; they did not block his path, touch him, or in any way physically restrain his freedom of movement.

In this case, the agents testified that they were dressed in suits; that they approached Berryman just outside of the terminal; that they did not display their

weapons; that they did not order Berryman to stop; that Berryman said he "didn't mind" speaking with them and never asked if he could leave; and that, while the agents stood on either side of Berryman, they did not block his path (contrary to the majority's suggestion at p. 9), touch him, or restrain his movement. There may be a difference, but if so it takes the judicial equivalent of Mozart's musical ear to detect it.

Of course, the panel properly emphasizes the fact that the district court erred in finding that the agents explicitly told Berryman that he need not answer, for there is no testimony to this effect in the record. This error, however, does not warrant the panel's rejecting the district court's decision to

accept the agents' testimony about everything else that occurred. Credibility is a matter for the district court. See, e.g., Jackson v. United States, 353 F.2d 862, 865 (D.C. Cir. 1965); Marsh v. United States, 29 F.2d 172, 173 (2d Cir.)(L. Hand, J.), appeal dismissed, 277 U.S. 511 (1928), and cert. denied, 279 U.S. 849 (1929). If the panel believes that its failure to find support for one of the district court's factual findings fatally infects all its other findings, then a remand is called for, not reversal. See, e.g., United States v. Heimforth, 493 F. 2d 970, 972 (9th Cir.), cert. denied, 416 U.S. 908 (1974); United States v. Sicilia, 457 F.2d 787, 788 (7th Cir. 1972)(per curiam), cert. denied, 414 U.S. 865 (1973); United States v. Greely, 425 F.2d 592 (D.C. Cir. 1970).

2. Next, consider whether any events subsequent to the agents' initial questioning change the result. The panel suggests that even if the initial questioning were proper, the agents were not justified in prolonging their questioning of Berryman or in x-raying his package. However, whether a seizure ever took place prior to the time the agents opened the package is doubtful. One of the agents testified that once he felt the powder, he subjectively believed that he would not let Berryman depart, while the other agent stated that even after the package had been x-rayed, "(a)s far as I was concerned (Berryman) was free to go at that time." And, in any case, our test of whether there has been a seizure is an objective one: "how the objective facts would appear to a reasonable

person." United States v. Viegas, 639 F.2d at 44; see United States v. West, 651 F. 2d at 72.

Regardless, even if Berryman was "seized" in the course of the questioning, a temporary seizure of the type at issue here is lawful if the police have "a reasonable and articulable suspicion that the person seized (was) engaged in criminal activity." Reid v. Georgia, 448 U.S. at 440; see Florida v. Royer, 51 U.S.L.W. at 4295 (opinion of White, J.) ("articulable suspicion that a person has committed or is about to commit a crime"); Terry v. Ohio, 392 U.S. at 21 ("specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"); United States v. Regan, 687 F.2d

at 536 ("reasonable and articulable suspicion"); United States v. Viegas, 639 F.2d at 44-45. By the time Berryman had answered a very few questions, there was ample ground for reasonable suspicion. The majority states that "Berryman's answers to the initial questions in the present case did not create suspicion when none existed before." But, how can this be so? Did not the facts: (1) that Berryman paid for a business-trip ticket in cash; (2) that Berryman used one-way tickets for a short round-trip flight and said he preferred to fly on one-way tickets; and (3) that Berryman said he flew to Florida to talk about a land deal in Alaska, all reasonably increase the agents' suspicion? If not, I do not understand how the word "suspicion" is used.

As to whether the agents had reasonable suspicion to x-ray the package, the answer is even clearer. By the time the agents went to x-ray the package they had, in addition to noting the suspicious circumstances cited above, felt lumpy powder in a package that Berryman said someone in Florida had given him and which he said probably contained a toy. I should think that this amounts to "reasonable suspicion" -- perhaps even to "probable cause." See, e.g., United States v. Waltzer, 682 F.2d 370, 372 (2d Cir. 1982) (probable cause found in airport investigation); United States v. Corbitt, 675 F.2d 626, 629 (4th Cir. 1982) (same).

3. Florida v. Royer, supra, does not help the panel, for this case differs from Royer in every relevant respect. The cause for detention here included Berryman's

having told the agents that he went to Florida to negotiate a deal about Alaskan land and the agents having physucally felt a powder-like substance; in Royer, it consisted only of a "nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister Bags. . . ." Florida v. Royer, 51 U.S.L.W. at 4297. The detention here consisted of having Berryman answer questions in public, having Berryman follow the agents to an x-ray machine, and then having him wait outside the Delta Airlines baggage office. In Royer, it consisted of bringing Royer to a "police interrogation room" which was "a small room -- a large closet -- equipped with a desk and two chairs." Id. at 4296. Finally, in Royer, the Court found that the "officers' conduct was more intrusive

than necessary to effectuate an investigative detention," in part because the officers did not "return( ) his ticket and driver's license, and inform( ) him that he was free to go if he so desired . . . ." Id. Here the agents never moved Berryman to an interrogation room, did not keep his ticket and driver's license, and told him at the end of the proceedings that he was free to go though he might later be arrested. In sum, this case does not contain the elements on which the Royer Court relied in finding a Fourth Amendment violation; it does contain the elements that the Royer Court suggested would show a lack of such a violation; and the panel's holding seems to me to violate the rules governing "airport seizures" set out in the nearly

unanimous Part II of the Royer case.

For these reasons, I dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL

No. 81-347 MAZZONE, D. J.

UNITED STATES OF AMERICA

V.

FRED S. BERRYMAN

MOTION TO SUPPRESS

APPEARANCES:

John LaChance, United States Attorney,
for the Government

Karnig Boyajian, Esquire
for the Defendant

Courtroom No. 4
Federal Building
Boston, Massachusetts
December 9, 1981

THE COURT: This motion to suppress both the quantity of narcotics and statements is based on the events that occurred on September 8, 1981, at the Logan Airport where, in the deplaning area of Delta Airlines, the attention of two Drug Enforcement Administration agents was called to the activities of Mr. Berryman.

The attention was unusual, they say, because he walked rapidly out of the deplaning area toward the baggage area and looked back over his shoulder at one time. That was the initial impression.

Now, the motion to suppress is based on the assertion that the arrest was made without probable cause and without a warrant and any search or seizure incident thereto was not incident to a lawful arrest. But before we even get to the

question of probable cause or even reasonable suspicion to stop, the first determination is whether Mr. Berryman was seized within the meaning of the Fourth Amendment.

The answer to that question can be traced starting with Terry versus Ohio and now comes to United States versus Mendenhall and Reid versus Georgia; and in this circuit, United States versus West, 651 F.2d, '71, First Circuit, 1981.

In Mendenhall the Supreme Court said that an initial encounter based on this so-called drug courier profile was not a seizure within the meaning of the Fourth Amendment.

In Reid versus Georgia, on somewhat similar facts, decided shortly thereafter, the court declined to address that question.

The issue of whether or not an encounter under the same conditions was a seizure was not decided. So the proper standard for determining that issue is still in doubt. It has never been decided. It is open.

That leads me in this circuit to West, United States versus West. And in West at Page 72 it says: "The standard for determining whether a seizure of the person has occurred has been stated as 'if in view of all the circumstances surrounding the incident a reasonable person would have believed he was not free to leave (quoting Mendenhall).'"

And examples of the kind of circumstances that would indicate a show of authority, again citing Mendenhall, was set out as the threatening presence of several officers, the display of a weapon

by an officer, some physical touching of the person or citizen, use of language or tone of voice stating that compliance with the officer's request might be compelling -- and, as you can see, I am reading from West.

So the question here is whether or not on these facts in view of all the circumstances a reasonable person would have believed he was not free to leave.

The facts are in sharp contrast. According to the agents, the encounter was a proper, nonoffensive, direct, nonmenancing, cooperative approach by them to Mr. Berryman. According to Mr. Berryman, there was an inherently threatening or coercive nature in the encounter. And he subjectively felt threatened and coerced, but that's not the test.

It's not what Mr. Berryman thinks.

In any event, the testimony is in sharp conflict and I must conclude that there is no basis to disbelieve the agents' testimony. I accept it. They are experienced agents. They are in plain clothes. Their weapons were concealed, although there may have been some inadvertent display. They were not displayed openly. There was no physical restraint.

I accept the agents' testimony that Mr. Berryman was told that he was free to leave. The area was public. I conclude that on these facts a reasonable person would not have believed that he was not free to leave or decline to answer any questions.

So, on the basis of United States versus West, I conclude as to the first

issue that there was no seizure within the meaning of the Fourth Amendment.

The next question: Whether or not there was a valid consent to the search of the suitcase. Again, the testimony is in sharp conflict as to the nature of the encounter, not so much as to what was said. It's just the impression that is in conflict -- what Mr. Berryman derived from the contact as opposed to what the agents derived. But the testimony does concede he gave permission to open the suitcase, again under what he describes as an inherently coercive nature because, apparently, he chooses to rest his case on the assertion that he did not know what the package contained. And that's a perfectly valid assertion and a jury will decide the credibility of that statement. That's not for me to decide. And

I don't prejudge that in any way.

He opened the suitcase which was locked. So that I conclude -- and Mr. Berryman impressed me as an intelligent man. He runs his own business. His presence on the stand reflects a person of some education and intelligence and not likely to be frightened so that he would not be able to make a sensible decision in his best interest. So I conclude that his consent was a valid and voluntary one.

I will not repeat all the facts above, but I find consent was explicit and freely and voluntarily given.

There is an aspect to that that might need some enlargement, and that is if his consent would have been involuntary, if he were told he would not be free to leave -- under those circumstances,

even if he gave consent, the Court could consider it to be involuntary. But, again, that's not the situation here. I conclude and find he was told he was free to leave. He only felt that he was not. And his consent may have been based on the fact that he did not know what was in the package and, therefore, had nothing to worry about. Again, that's a question I believe for a jury.

He was capable of a knowing consent. He was warned. There was no subterfuge. There was no trickery. He is intelligent. He possessed the key. It was a cooperative interrogation in a public area, and he was not in custody.

So under the totality of the circumstances that existed at the time, I feel his consent was freely and voluntarily given.

As to his statements he made at that time or post indictment time -- and I reserve the question of whether or not the statement he made after he was under arrest should be admitted, I will leave that to another time because I am not sure whether or not he may have asked for a lawyer, might not have asked for a lawyer, and the record is not fully developed for me to make findings in that area -- but as to the statements made at the airport, they are governed by the same circumstances and I need not repeat the facts here, and those statements were voluntarily given in a noncustodial setting. And even when the time came that there may be some custodial intention, his Miranda rights were afforded him.

I need not reach the question of

standing on this issue -- on the decision, I need not reach the question of standing.

Those constitute my findings of facts and conclusions of law as to this case, and the motion to suppress will be denied. I will endorse the motion, and, while I am here counselor, I have also reviewed the motion to dismiss.

The questions raised by Mr. Boyajian are questions which have been raised before, and unfortunately, decided contrary to his position. There is no basis for me to take a frolic of my own. They make sense sometimes, but it is a legislative determination as to what constitutes a narcotic drug and all. I will deny that motion as well.

Thank you very much, counsel.

CERTIFICATE

I, James J. Gibbons, Official Reporter of the United Stated District Court, do hereby certify that the foregoing transcript, pages 1 through 8, inclusive, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the above-entitled action.

_____

UNITED STATES DISTRICT COURT for
District of Massachusetts

United States of America Vs.

Defendant - Fred S. Berryman

No. CR 81-00347-01-MA

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date February 19, 1982

With Counsel Karnig Boyajian, Esq.

Plea Not Guilty

Finding & Judgment	There being a verdict of Guilty. Defendant has been convicted as charged of the offense(s) of knowingly and intentionally possession with intent to distribute a quantity of cocaine, a Schedule II Controlled Substance as charged in Count 1 in violation of Title 21, U.S.C. § 841(a)(1)
Sentence or Probation Order	The court asked whether defendant had anything to say why the judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted

and ordered that: The defendant is hereby commited to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years. The Court further orders a Special Parole Term of three (3) years.

Special Conditions Probation

The defendant is allowed voluntary surrender.

Signed by
U.S. District Court Judge
/s/ A. David Mazzone

Certified a True Copy On

This Date February 22, 1982

By Elaine Flaherty - Clerk